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Amoco Oil Company, Washington, D. C. (Case No. FEA-0210, Filed 8-28-74, Decided 2-7-75).

Freedom of information.—Amoco Oil Company appealed from an Order issued by the FEA denying in part two Requests for Information submitted by Amoco under the Freedom of Information Act. Amoco had requested (i) all information submitted to the FEA by refiners of crude oil under specified FEA regulations and reporting requirements; (ii) all information and computations used by the FEA in developing the Refiners' Buy-Sell List for the first and second allocation quarters; and (iii) certain information relating to whether particular firms qualified as "independent refiners." The FEA determined that, with the exception of certain affidavits and letters relating to the FEA's determination of "independent refiner" status, the documents requested by Amoco contain confidential commercial and financial information which is exempt from disclosure under 5 U. S. C. 552(b)(4). The FEA found that disclosure of such documents would not be in the public interest since they contain sensitive commercial information. Consequently, the FEA concluded that Amoco had failed to demonstrate that the Order was erroneous in fact or law with regard to such documents. As to the remainder of the requested documents relating to the FEA's determination of "independent refiner" status, the FEA found that these documents are not composed solely of information which is exempt from the disclosure requirement of the Freedom of Information Act, and that Amoco had a right to the data requested. The Amoco Appeal was therefore granted in part and the FEA Director of Communications and Public Affairs was directed to make copies of such documents available to Amoco, after deleting all confidential commercial or financial information which is exempt from public disclosure.

Decision and Order

Amoco Oil Company (Amoco) filed an Appeal with the Office of Exceptions and Appeals of the Federal Energy Administration from an Order issued by the FEA denying in part two Requests for Information. The Requests for Information had been submitted to the FEA by Amoco pursuant to Section 202.3 of the FEA Regulations relating to disclosure of information. Those Regulations, contained in 10 CFR, Part 202, specify the procedures to be followed in requesting the FEA to disclose information which is not available in a public reference facility and which is not otherwise customarily made available to the public by the agency.

In the first Request for Information submitted on June 17, 1974, Amoco requested that the FEA release all information submitted by refiner-buyers and refiner-sellers under specified FEA regulations and FEA reporting requirements, together with all "information. . . . and computations made and/or relied upon and the rationale used" in determining the crude oil Refiners Buy-Sell Lists for the first and second allocation quarters. In addition, Amoco requested the release of all information which the FEA used in determining which individual firms qualified as "independent refiners", under Sections 211.62 and 211.66(f) of the Mandatory Petroleum Allocation and Price Regulations and all letters or orders issued

by the FEA granting or denying such status. Finally, in a second, supplementary Request for Information submitted on June 21, 1974, Amoco requested that the FEA release all "information . . . and computations made and/or relied upon and the rationale used" in issuing the "Correction of Crude Oil Allocation Notice" published by the FEA on June 21, 1974 with respect to the Refiners Buy-Sell List for the second allocation quarter.

Having considered Amoco's Requests for Information, the FEA issued an Order on August 6, 1974, releasing a portion of the requested information to Amoco and indicating the procedures whereby Amoco could obtain additional information. That Order also denied Amoco access to the remainder of the requested information on the grounds that the information was confidential, commercial data and therefore should be withheld from public disclosure under the provisions of 5 U. S. C. 552(b)(4).

The provisions of 5 U. S. C. 552, known as the Freedom of Information Act, were implemented by the FEA in Subpart A of Part 202 of the Mandatory Petroleum Allocation and Price Regulations. Although the primary purpose of the Freedom of Information Act is to encourage disclosure of information held by the Government to private citizens upon their request, the Congress recognized that the public interest requires that certain categories of information remain exempt from mandatory disclosure. In this regard, Section 552(b) lists nine specific exemptions from the disclosure requirements of the Act. (An identical list may be found at 10 CFR 202.9(a).) The fourth exemption, on which the FEA relied in denying in part Amoco's Requests for Information, applies to matters which are:

Trade secrets and commercial or financial information obtained from a person and privileged or confidential.

In its appeal Amoco asserts that the FEA's classification of a portion of the requested information as exempt from the disclosure requirements of the Freedom of Information Act was incorrect. The application of 5 U. S. C. 552(b)(4) to each set of information requested by Amoco must therefore be considered.

First, Amoco requested the disclosure of all information submitted by refiners and all computations made by the FEA in calculating the Refiners Buy-Sell Lists for the first two allocation quarters. In preparing the February 1, 1974 Buy-Sell List the FEA utilized data submitted by refiners on Forms FEO-900A, 900-B1 and 900-B2. These forms, which all refiners of crude oil must submit, contain highly sensitive commercial information concerning the internal operations of each refiner. Form FEO-900A contains a refiner's operable capacity, the estimated quantity of domestic and imported crude oil available to that refiner for processing in the February through April 1974 quarter and the estimated quantity of crude oil processed under processing agreements for that refiner and by that refiner. Form FEO-900-B1 sets forth a refiner's operable capacity as of January 1, 1974, based on its historical refining capacity or actual crude oil runs as reported to the Bureau of Mines, adjusted by subsequent changes in capacity. Form FEO-900-B2 contains the quantity of domestic and imported crude oil processed by a refiner for each month from January 1972 through April 1974, the quantity of other input feedstocks it processed in that period and the quantity of gasoline produced by that refiner in that period.

The information contained on these forms is the type of commercial information protected from disclosure under the fourth exemption to the Freedom of Information Act. With the exception of historical refining capacity as reported to the Bureau of Mines, which has been made publicly available by the Bureau of Mines and has also been made publicly available by the FEA to the National Petroleum Refining Association, the information contained on the three forms submitted by all refiners to the FEA is not otherwise publicly available and is not the type of information which a refiner would be likely to disclose.

In this connection the United States Court of Appeals of the District of

Columbia Circuit has stated that the fourth exemption to the disclosure requirements of 5 U. S. C. 552 "may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position". *National Parks and Conservation Association v. Morton*, 498 F. 2d 765 (C. A. D. C. 1974). The disclosure of the information contained on the three forms would reveal sensitive aspects of the refiner's internal operations with respect to its competitive position, indicating the refiner's cost of crude oil (i. e., the quantities of domestic and imported crude oil purchased by the refiner), the historical inputs and outputs of the refiner and the names of refiners with which it has entered into processing agreements and the quantities involved in these agreements. Competitors of the refiner could utilize such information in preparing their marketing strategies. They could adjust their strategies to potential changes in the prices charged by the refiner, and to shifts in the type of products produced by the refiner. Competitors could also utilize such information as a basis to infer the types of possible actions which the refiner would be likely to take in future periods. A prospective purchaser of petroleum products from the refiner could obtain valuable information from the requested forms as to the cost and supply of crude oil and other petroleum products of a particular refiner. The disclosure of that type of information to a purchaser could easily give it an unfair advantage over the refiner with which it is dealing and over other purchasers with whom it is competing for supplies. Thus, the disclosure of the information contained on the three forms could, if released to a competitor or prospective purchaser, cause serious competitive injury to the refiner submitting the information and the information was properly classified by the FEA as exempt from disclosure pursuant to 5 U. S. C. 552 (b)(4). See also *Kocolene Oil Corporation*, CCH Fed. Energy Guidelines, Par. 20,199 (December 2, 1974); *Reinauer Petroleum Company*, CCH Fed. Energy Guidelines, Par. 20,216 (December 23, 1974).

In computing the February 1, 1974 Buy-Sell List, the FEA transmitted the information which it received on the three forms to a computer. The computer performed the calculations specified in 10 CFR, 211.65(f) (39 F. R. 1924, January 15, 1974) and produced a printout of the Refiners Buy-Sell List and a summary of the adjustments for each refiner. The August 6, 1974 Order specified procedures whereby Amoco could obtain the computer program from the FEA, but denied Amoco access to the actual computer printout. The FEA concluded that the computer printout itself contained confidential, commercial information that should be withheld from disclosure pursuant to 5 U. S. C. 552(b)(4).

The classification of the computer printout as exempt from disclosure was clearly appropriate under the standards discussed above. The printout consists of summaries of crude oil transactions for each refiner, including prices and quantities, drawn from the information submitted by the refiner on the three forms discussed above. The printout represents a compilation and reorganization of the information contained on the three forms. By reversing the operations detailed in the FEA's computer program, Amoco could obtain the confidential data originally submitted to the FEA by each refiner. The release of the computer printout would thereby frustrate the FEA's attempt to prevent the possible competitive harm that could result from the disclosure of the information submitted by the refiners.

Other than the data contained in Forms FEO-900A, 900-B1, and 900-B2, no other information was used by the FEA in preparing the February 1, 1974 Buy-Sell List. However, in preparing the June 7, 1974 Buy-Sell List the FEA used certain additional information submitted to the FEA by all refiners on Form-900A (rev. 5-74). This form contains estimates of the supplies of crude oil available to the refiner submitting the form in June through August 1974, the quantities of crude oil which the refiner purchased and sold

in various periods, the processing agreements entered into by the refiner and the actual available crude oil for runs to stills for the refiner. The FEA, in a recent decision concerning a request for certain forms FEO-900A (rev.), affirmed the denial of a request for the disclosure of such forms on the grounds that the information is confidential, commercial data and has "a potential for misuse by the refiner's competitors and purchasers . . ." *Mobil Oil Corporation,* CCH Fed. Energy Guidelines, Par. 80,513 (January 22, 1975). That decision controls the disposition of this issue, and the request for these forms was properly denied.

In preparing the June 7, 1974 Buy-Sell List, the FEA also used a computer program to produce a printout similar to the printout discussed above with regard to the February 1, 1974 Buy-Sell List. A memorandum used by the FEA in writing the computer program was made available to Amoco, and the FEA specified procedures whereby Amoco could obtain the computer program from the FEA. The actual computer printout, like the February 1, 1974 computer printout, was withheld from disclosure pursuant to 5 U. S. C. 552(b)(4). For the reasons discussed in considering the February 1, 1974 computer printout, the computer printout used in preparing the June 7, 1974 Buy-Sell List is also exempt from the disclosure requirements of the Freedom of Information Act pursuant to the fourth exemption.

Amoco also requested that the FEA provide all information used in calculating the amended Buy-Sell List published by the FEA on June 21, 1974. In preparing the amended Buy-Sell List the FEA used information submitted by all refiners of crude oil as to the quantity of imported and domestic crude oil bought and sold by each refiner during the first allocation quarter, as well as certain information submitted by all refiners on Form FEO-900A (rev.). The FEA, in a previous decision, sustained a denial of an identical request for information, concluding that ". . . the highly sensitive commercial information requested by Mobil, if made available to a competitor of the refiner submitting the information, could be used to the competitive detriment of the refiner." *Mobil Oil Corporation, supra.* Consequently the FEA, in denying this aspect of Amoco's request for information, properly classified the information as exempt from public disclosure pursuant to 5 U. S. C. 552(b)(4).

Even though the information discussed above is exempt from the disclosure requirements of the Freedom of Information Act, the FEA regulations require the release of information submitted to it unless the FEA also determines that disclosure would not be in the public interest. See 10 CFR 202.1. Amoco contends that all of the requested information should be disclosed by the FEA to assure the uniform application of the Mandatory Crude Oil Allocation Program to Amoco and other refiners, to enable Amoco to assess the impact of future crude oil allocations on its operations, and to enable Amoco to formulate proposals for changes in the program. Similar contentions were set forth by Mobil Oil Corporation in its Appeal of Denial of Request for Information discussed above. In that Decision the FEA stated:

> . . . the highly sensitive commercial information requested by Mobil, if made available to a competitor of the refiner submitting the information, could be used to the competitive detriment of the refiner. As a result, the undesirable consequences that could result from the disclosure of the information to the public significantly outweigh the interests which Mobil contends would be served by the release of this information. *Mobil Oil Corporation, supra.*

The requested information in this case is almost identical to the information requested by Mobil. Amoco has presented no evidence or arguments to distinguish this case from *Mobil.* The public interest would be best served by non-disclosure.

In an attempt to protect the confidentiality of the data received while at the same time furnishing Amoco with all possible data which could legitimately be released to it, the FEA, in

the August 6, 1974 Decision, offered to prepare a memorandum summarizing the information which it used in calculating the Buy-Sell Lists, without including information identifying particular refiners. Such a memorandum, in addition to the information already made available to Amoco, would have certainly permitted Amoco to become familiar with the manner in which the Buy-Sell Lists were prepared and would have permitted Amoco to assess the probable impact of future crude oil allocations on its operations. Amoco has not yet requested the preparation and release of this memorandum.

It should also be noted that the FEA's disclosure of the information requested by Amoco might well violate 18 U. S. C. Section 1905, which subjects to criminal sanctions any Federal officer or employee who discloses any information which concerns or relates to "the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association" to any extent not authorized by law.

In addition to the information concerning the Buy-Sell Lists, Amoco requested that the FEA make available to it all information which the FEA used in determining which refiners qualified as "independent refiners" and all letters or orders issued by the FEA granting or denying such status. The only documents used by the FEA in making these determinations were affidavits submitted by refiners requesting that they be classified as independent refiners. These affidavits contain information concerning the sources of the refiner's crude oil, exchanges of crude oil by the refiner, the refiner's production and marketing structure and the refiner's investments in other petroleum-related businesses. The FEA, in its August 6, 1974 Order to Amoco, concluded that the affidavits contained confidential, commercial information which should be withheld from disclosure under 5 U. S. C. 552(b)(4). Although the affidavits clearly contain confidential, commercial information of the type discussed above, the affidavits, unlike the forms and computer printouts, are not composed solely of information which is exempt from the disclosure requirements of the Freedom of Information Act. The affidavits were therefore incorrectly classified as exempt in their entirety from disclosure. The FEA should consequently release the requested affidavits to Amoco after deleting all information contained in them which constitutes confidential commercial or financial information exempt from disclosure under 5 U. S. C. 552(b)(4). This procedure is required by the Freedom of Information Act (see *Grumman Aircraft Engineering Corporation v. Renegotiation Board*, 425 F. 2d 578, at 580 (C. A. D. C. 1970); *Kocolene Oil Corporation, supra.*) and will make available to Amoco all information it seeks in its original requests which is not specifically exempt under the provisions of the Act.

In its August 6, 1974 Order, the FEA provided Amoco with two letters of interpretation issued to particular refiners explaining the FEA's determination of the refiner's status under Section 211.62 and 211.66(f) of the FEA Regulations. Confidential, commercial information was deleted from the letters released to Amoco. However, in its request for information, Amoco requested the disclosure of all such letters issued by the FEA. These letters, like the affidavits submitted by refiners discussed above, should be released to Amoco with proper deletions made to prevent the disclosure of confidential commercial or financial information exempt from the disclosure requirements of the Freedom of Information Act.

It Is Therefore Ordered That:

(1) The appeal filed by Amoco Oil Company from the Denial of Request for Information issued to it by the Federal Energy Administration on August 6, 1974 is granted in part as set forth in paragraph (2) below. Except as specifically set forth in paragraph (2) below the appeal is in all other respects denied.

(2) By February 25, 1975 the Director of Communications and Public Affairs of the Federal Energy Administration shall make available to Amoco

Oil Company the following documents after deleting all confidential commercial or financial information which is exempt from public disclosure pursuant to 5 U. S. C. 552(b)(4): (a) copies of all affidavits previously submitted to the Federal Energy Administration by refiners of crude oil for the specific purpose of qualifying as independent refiners pursuant to 10 CFR 211.62 and 211.66(f); and (b) copies of all letters or telegraphic message transmitted by the Federal Energy Administration to refiners which grant or deny independent refiner status to such refiner or which request additional information from the refiner in order to determine such status.

(3) The provisions of 10 CFR 202.8 relating to fees charged for the provision of records shall be applicable to all data referred to in paragraph (2).

(4) This is a final order of the Federal Energy Administration of which any aggrieved party may seek judicial review.

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Getty Oil Co., Getty Oil Co. (Eastern Operations), Inc., Skelly Oil Co. (Case No. FEA-0246, Filed 9-25-74, Decided 2-4-75).

Crude oil.—On September 25, 1974, Getty Oil Company (Getty), Getty Oil Company (Eastern Operations), Inc. (Getty Eastern) and Skelly Oil Company (Skelly) filed a joint Appeal from a Decision and Order issued by the Federal Energy Administration. In that Decision the FEA denied a request for exception filed by Getty Eastern and Skelly which, if granted, would have permitted the firms to be included within the definition of the term "small refiner" as set forth in 10 CFR 211.62. The FEA found that: (i) its initial decision correctly determined that Getty is a "refiner" as defined in 10 CFR 211.62; and (ii) the classification of all three firms as a single entity for purposes of the FEA Mandatory Crude Oil Allocation Program is consistent with the Emergency Petroleum Allocation Act of 1973 and does not deprive Getty of due process of law in violation of the Fifth Amendment to the United States Constitution. The FEA further found that for purposes of the Allocation Program, Getty Eastern's refining capacity properly includes that portion of its capacity utilized to process crude oil for third parties, and that Getty is able to meet its sales obligations under this program through increased importation, without adversely affecting its ability to fulfill its obligations to supply crude oil under other FEA regulations, and various contractual arrangements. The FEA therefore denied the Appeal.

Decision and Order

On September 25, 1974, Getty Oil Company ("Getty"), Getty Oil Company (Eastern Operations), Inc. ("Getty Eastern"), and Skelly Oil Company ("Skelly") filed a joint appeal from a Decision and Order issued by the Federal Energy Administration on August 15, 1974. In that Decision the FEA denied a request for exception filed by Getty Eastern and Skelly which if granted would have included the firms within the definition of the term "small refiner" as it appears in 10 CFR 211.62. In connection with its consideration of several additional requests for relief, the FEA also determined that Getty, Getty Eastern, and Skelly are a single